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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/599,311

09/25/2006

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112701-754

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11/04/2009

EXAMINER

ANDERSON, JERRY W

ART UNIT

PAPER NUMBER

1794

NOTIFICATION DATE

DELIVERY MODE

11/04/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

chicago.patents@klgates.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/599,311	<b>Applicant(s)</b> DAOUSE ET AL.	
	<b>Examiner</b> JERRY W. ANDERSON	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on 7/17/09.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 24-30 and 44 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 24-30 & 44 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

**DETAILED ACTION**

1. Examiner acknowledges the receipt of the Applicant's Amendment, mailed 7/17/2009. Claims 24-30 & 44 amended and pending.

***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 24 and 44 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. The term "excess quantity compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer" in claims 24 and 44 is a relative term which renders the claim indefinite. The term " excess quantity compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer " is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**7. Claims 24-30 and 44 rejected under 35 U.S.C. 103(a) as being unpatentable over Carter, P.H., et al., (3,171,367) in view of Covert, C.J., et al., (2,670,696) and further in view of Ohlin. E.L. (3,552,212)**

8. Carter ('367) discloses:

- a. Conventional ice cream cones, (line 31, col. 1, '367)
- b. The coating on the cones prevents them from becoming soggy when the ice cream is added, (lines 41-43, col.1, '367)
- c. Coating applied to interior of cone, (lines 8-9, col.2, '367)
- d. Deposit coating material . . . cones immediately before ice cream . . . chills and hardens the coating, (lines 2-5, col.2, '367)
- e. Spray . . . covers the inside surface of the pastry cone with a layer of chocolate, (lines 51-53, col.3, '367)
- f. Coating other than chocolate can be used, (lines 37-38, col.4, '367)

9. Covert ('696) discloses:

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- g.      Molds are filled by depositing machine, (lines 41-42, col.1, '696)
  - h.      Nozzle may enter mold substantially to the bottom of the mold cavity,  
(lines 6-10, col.2, '696)
  - i.      The suction is on when the nozzle meets the surface of the liquid in the  
mold cavity, (lines 1-5, col.2, '696)
  - j.      The chocolate removed by suction to the tempering kettle . . . supply the  
depositing machine, (lines 28-30, col.2, '696)
  - k.      The action may be relatively rapid and continuous, . . . high rate of  
production, and a uniform, high grade product, (lines 13-15, col.3, '696)
10.    Ohlin ('212) discloses:
- l.      A collar has a bore slightly larger in diameter than tube is positioned so  
that the portion of the tube is cleaned as it passes through bore. (abst. '212)
  - m.      Device for cleaning the exterior of an elongated body . . . removing loosely  
adhering matter, (lines 27-29, col. 1, '212)
  - n.      Tubular probe which is mounted for movement up and down out of and  
into successive sample containers for withdrawal of the samples therein, (lines  
43-45, col. '212)
  - o.      Efficient removal of loosely adhering matter from the exterior of an  
elongated member, (lines 61-62, col. 1, '212)
  - p.      Effecting an efficient removal of sample residues from the outer surface of  
a tubular probe, (lines 63-64, col. 1, '212)

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q. Air may drawn through both ends of the annular space during the downward as well as the upward movement of the probe, (line2 28-30, col. 1, '212)

r. if the diameter of the bore is too large in relation to the diameter of the probe, the flow of wash-liquid and air may be inadequate to ensure an efficient removal, (lines 37-39, col. 3, '212)

11. Regarding claims 24 and 44, Carter discloses the claimed invention, including, Spray . . . covers the inside surface of the pastry cone with a layer of chocolate, (lines 51-53, col.3, '367), but lacks excess chocolate, removing excess chocolate, recycling chocolate, and back flushing the nozzle. Covert discloses molds are filled [with chocolate] by depositing machine, (lines 41-42, col.1, '696) Nozzle may enter mold substantially to the bottom of the mold cavity, (lines 6-10, col.2, '696) The suction is on when the nozzle meets the surface of the liquid in the mold cavity, (lines 1-5, col.2, '696) The chocolate removed by suction to the tempering kettle . . . supply the depositing machine, (lines 28-30, col.2, '696), but lacks back flushing of the nozzle, Ohlin ('212) discloses: a device for cleaning the exterior of an elongated body and removing loosely adhering matter, (lines 27-29, col. 1, '212) with a collar with a bore slightly larger in diameter than tube is positioned so that the portion of the tube is cleaned as it passes through bore, (abst. '212) Tubular probe which is mounted for movement up and down out of and into successive sample containers for withdrawal of the samples therein, (lines 43-45, col. '212)

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12. Carter, Covert and Ohlin are analogous art, Carter and Covert, are involved in the manufacture of chocolate covered ice cream cones, Ohlin is concerned with a similar problem the removal of loosely adhering material and the cleaning the exterior of a probe that going from one container to another.

13. It would have been obvious to one of ordinary skill in the art at the time of the invention to have modified the chocolate coated ice cream cone machine of Carter, to incorporate the use of excess chocolate, and the suction removal of the chocolate of Covert, and the cleaning of the probe of Ohlin, in order to make a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream, and result in a action may be relatively rapid and continuous, . . . high rate of production, and a uniform, high grade product, (lines 13-15, col.3, '696) Although Covert does not explicitly state that the chocolate recovered from the molds by the nozzle is recycled, he does state that it goes to the tempering kettle and thence to the depositing machines. (lines 28-30, col.2, '696) It would be obvious to one of ordinary skill in the art that the chocolate recovered in Covert was being recycled for further use. One of ordinary skill in the art would find it obvious that the nozzle having suction applied and the exterior washing of Ohlin would serve the same purpose in a similar manner as the instant application.

14. Regarding claim 25, Carter, Covert and Ohlin disclose the claimed invention, as discussed above; including the suction through the nozzle would suck particulate matter into the kettle.

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15. Regarding claim 26, Carter, Covert and Ohlin disclose the claimed invention, as discussed above, including that the nozzle of Ohlin fits snugly in a sleeve, (Fig. 2 & 3, '212) such that any particulate matter that adheres to the nozzle will be removed during the retraction into the body.

16. Regarding claim 27, Carter, Covert and Ohlin disclose the claimed invention, as discussed above, including the nozzle of Ohlin has an opening in the bottom of the nozzle, and the nozzle is retracted into a chamber with an inlet for the admission of gaseous or liquid purges. (Fig.2 & 3, '212)

17. Regarding claim 28, Carter, Covert and Ohlin disclose the claimed invention, as discussed above, including the container is a conventional ice cream cone, (line 31, col. 1, '367)

18. Regarding claim 29, Carter, Covert and Ohlin disclose the claimed invention, as discussed above, including the coating is chocolate. (lines 37-38, col.4, '367)

19. Regarding claim 30, Carter, Covert and Ohlin disclose the claimed invention, as discussed above, including food product is ice cream. (lines 41-43, col.1, '367)



***Response to Amendment***

20. The applicant amended claims 24 and 44, but amendments did not remove the indefiniteness, and thus, the 35 USC § 112 rejections thereunto are NOT withdrawn.

**Response to Arguments**

21. Applicant's arguments, see Paragraph 3, pg 10, filed 7/17/2009, with respect to Carhuff being improper prior art, due being subject to a common assignee, have been fully considered and are persuasive. The 103 rejection of claims 24-30 and 44 has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of based upon Carter, in view of Covert and further in view of Ohlin

22. The remainder of the applicant's arguments being directed to the use of Carhuff are moot, except for the following:

23. First: The applicant is making a distinction between spraying the interior of the cone with an excess amount of chocolate coating sufficient to form a continuous layer, and removing the excess, and the prior art filling the mold with chocolate and removing the excess, leaving a layer of chocolate on the interior of the mold. It would have been obvious to one of ordinary skill in the art that the two methods accomplish similar goals with similar methods. The interior of the mold or the cone is completely coated with chocolate and there is a hollow interior ready to accept a filling.

24. Second the applicant postulates that one of ordinary skill in the art would find that the chocolate cone became soggy if filled with chocolate, but nowhere in the

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specification nor the claims does he allude to an upper limit on the amount of chocolate, on the contrary, the applicant repeatedly states that an "excess quantity" of chocolate is used.

25. Third the applicant states the prior art is not analogous, that the fields are too disparate to combine, In response to applicant's argument that Carter and Covert are nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Carter and Covert are both directed to the preparation of chocolate containing comestibles for human consumption, and thus are from the same field of endeavor.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JERRY W. ANDERSON whose telephone number is (571)270-3734. The examiner can normally be reached on 7 am to 5 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. SAYALA/  
Primary Examiner, Art Unit 1794

jwa